DANIEL WHYTE
BRENDAN BEATTY
NICHOLAS J. GOCHIS
Special Assistant Attorneys General
MONTANA DEPARTMENT OF REVENUE
Legal Services Office
125 North Roberts Street
PO Box 7701
Helena, MT 59604-7701
Telephone: (406) 444-3340; (406) 444-1602
Email: dwhyte@mt.gov; bbeatty@mt.gov

Attorneys for the Department

**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY**

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,	**Cause No.: DV-15-1152A**
Plaintiffs,	
vs.	**MONTANA DEPARTMENT OF REVENUE'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF THE DEPARTMENT'S CROSS MOTION FOR SUMMARY JUDGMENT**
MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,	
Defendants.	

Defendants, Montana Department of Revenue and Mike Kadas (Department), by and through counsel of record, now appear and respond in opposition to the Plaintiffs' motion for summary judgment and cross-move for summary judgment in favor of the Department.

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INTRODUCTION

Plaintiffs Espinoza, Anderson, and Schaefer challenge the adoption of the Department's rule prohibiting payment of scholarships to religious quality education providers (QEP) in compliance with Senate Bill No. 410 (SB 410) and the Montana Constitution. There are several issues of first impression before this Court that require careful consideration.

As a preliminary matter, the haste at which Plaintiffs insist this case must move may ultimately result in a decision that is premature. Only $3,400 have been pledged as donations, and only one Student Scholarship Organization (SSO) has registered with the Department. It is untested whether this fledgling program interferes with any person's constitutional rights. Despite the Court's preliminary injunction of March 31, 2016, requiring inclusion of all QEPs or scholarship applicants in the program, potential program participants have failed to materialize. Additionally, the Court has before it an unopposed motion to intervene by the Montana Quality Education Coalition (MQEC), and the Court's determination as to the inclusion of MQEC has a material effect on the proceedings before this Court.

The parties would be best served by some time for investigation and discovery to determine if there are material facts in dispute and to present a complete record to the Court for full consideration of the significant issues before it. The Department reserves any rights it may have to develop a full record for review by the Court and on appeal. Nonetheless, the Department agrees that with the limited record available to the parties, there appear to be no material facts at issue and presents its opposition to the Plaintiffs' motion and its own cross-motion for summary judgment.

The Department is entitled to judgment as a matter of law that the statute requires the program to be implemented in a manner that avoids directly or indirectly supporting religious education with public funds. When the Court looks beyond the surface, several conclusions will

be evident: (1) the plain language of the statute does not lead to a clear determination that religious schools should receive scholarship money; (2) during the legislative process, the Montana Legislature instructed the Department to implement SB 410 according to the constitutional provisions prohibiting aid to religious schools, after being alerted of opponents constitutional concerns; (3) the delegates to the Constitutional Convention intended for the very strict prohibition against aid to religious schools; (4) the scholarships awarded here are exactly the type of indirect aid that are intended to be prevented by the Constitution; and (5) the Department's rule (ARM 42.4.802) protects the meaning of the constitution while avoiding the advancement of religious education with public funds.

At this point, the record of material facts established by the Plaintiffs and confirmed by the Department's affidavits demonstrate no genuine dispute that, absent the rule, the program's primary purpose and effect would be to support religious education with public funds in contravention of both state and federal constitutions. With the rule in place, the law is administered constitutionally. For the reasons stated below, the Court should deny the Plaintiffs' motion for summary judgment and grant the Department's cross-motion for summary judgment.

STANDARD OF REVIEW

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The purpose of summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving of resolution by trial. *Rumph v. Dale Edwards, Inc.*, 183 Mont. 359, 365, 600 P.2d 163, 167 (1979).

The moving party bears the initial burden of demonstrating both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Tin Cup County Water v.*

Garden City Plumbing & Heating, Inc., 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60, citing *Gliko v. Permann*, 2006 MT 30, ¶ 12, 331 Mont. 112, 130 P.3d 155. Once the moving party meets this burden, the burden then shifts to the nonmoving party to prove, by more than mere denial and speculation that a genuine issue does exist. If the court determines that genuine issues of fact do not exist, it must then determine whether the moving party is entitled to judgment as a matter of law. *Fielder v. Board of County Comm'rs*, 2007 MT 118, ¶ 12, 337 Mont. 256, 162 P.3d 67; *Xu v. McLaughlin Research Institute for Biomedical Science*, 2005 MT 209, ¶ 18, 328 Mont. 232, 119 P.3d 100 (internal citations omitted).

The Plaintiffs have challenged the constitutionality of the Department's rule.

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Powell v. State Compensation Insurance Fund, 2000 MT 321, ¶ 13, 15 P.3d 877; *Montana Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 368 P.3d 1131. The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt and, if any doubt exists, it must be resolved in favor of the statute. *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997). The Plaintiffs have the burden of establishing beyond a reasonable doubt that the Department's application of Mont. Const. art. X, § 6 is unconstitutional.

"Great deference and respect must be shown to the interpretations given the statute by the officers and agencies charged with its administration." *Montana Contractors' Association v. Department of Highways*, 220 Mont. 392, 395, 715 P.2d 1056, 1058 (1986).

BACKGROUND

I. ENACTMENT OF SENATE BILL NO. 410

During the Montana 64th Legislative Session, the Montana Legislature enacted SB 410, for the first time, explicitly providing general indirect financial aid to non-public schools. That bill is codified as § 15-30-3101, *et seq.*, MCA. The law allows a Montana taxpayer to receive a state income tax credit for a donation to an SSO, which, in turn, may provide scholarships to students to attend private schools. The SSO may accept donations from individuals or corporations for the purpose of providing scholarships to eligible students to enroll with a QEP. § 15-30-3103, MCA. The state does not have direct control over the flow of money into the program, however, it is clear that the Legislature intended that the Department monitor the activities of the SSOs. The Department must maintain a list of the SSOs, a list of the QEPs, and specific information from both. § 15-30-3106, MCA. The SSO is required to submit to the Department an annual fiscal review that discloses for the three most recent calendar years the total number of contributions to the SSO and the total number of contributors, as well as the total number and dollar value of scholarships obligated and awarded to students. § 15-30-3105, MCA. The Department is required to ensure that the SSO submits the annual fiscal review. *Id.* If the SSO fails to meet the requirements of §§ 15-30-3102, -3105, or -3107, MCA, it risks termination by the Department. § 15-30-3113, MCA. This program requires continuous state intervention and use of state financial resources. The Department must maintain a registry of student scholarship organizations, make public the SSO annual reports, maintain systems for the credits, and develop new forms. The anticipated costs include additions to the data systems of $420,325, and annual costs of three additional full time employees (one employee with the Office of Public Instruction (OPI)). SB 410 Fiscal Note, attached hereto as MDOR Ex. A., at 3-4. The annual direct costs to operate the program is $2,088,529 in fiscal year 2016, rising to

$3,472,662 by 2019. *Id.*, at 5. There is no recoupment from the program for these costs, and the costs are paid by the Montana taxpayers from the General Fund.

Among other requirements, a QEP is an accredited education provider (or that has applied for accreditation), or a non-accredited tutor that administers a nationally recognized standardized assessment test. § 15-30-3102, MCA. A QEP may not be a public school or a home school. § 15-30-3102, MCA. An eligible student applies for a scholarship from an SSO, and if awarded, may enroll with a QEP of their choosing. § 15-30-3104, MCA. The SSO awarding a scholarship must deliver the funds directly to the QEP of the parents' choosing. *Id.* The tax credit, directly supports the SSO, who keeps up to 10% for administrative purposes, and supports the school, who receives the scholarship money directly. In other words, the state of Montana pays donors for supporting SSOs, which in turn provide direct financial support to eligible schools.

Any person who donates to an SSO may receive a tax credit of an amount equal to the donation, not to exceed $150, for the year in which the donation is made. § 15-30-3111, MCA. In any single year, students receiving scholarships may receive no more than 50% of the per-pupil average of total public school expenditures, as calculated by the OPI. § 15-30-3103, MCA. The most recent per-pupil average is for 2014-15 school year and was $10,804, therefore 50% is $5,420. http://opi.mt.gov/pdf/SchoolFinance/TaxCreditsEdDonations.pdf. SB 410's fiscal note estimated that the average student scholarship would be $495 for calendar year 2016, and $543 for calendar year 2017. MDOR Ex. A, 3 of 7. The aggregate amount of tax credits allowed annually is capped at $3 million. § 15-30-3110(5), MCA.

During the legislative process, SB 410 took a curious path through the committee structure. The bill was not assigned to or debated in either the Senate or House tax committees. Instead, it was debated in Senate Finance and Claims Committee first. As noted by Sen. Jones,

both as Chairman of the Committee and as the bill sponsor, only a bill's financial issues are discussed in Senate Finance and Claims, not the substantive issues. SB 410, Senate Finance and Claims Committee Transcript (March 25, 2015), attached hereto as MDOR Ex. B, at. The only proponent of the bill was the Montana Rural Education Association, limited only to the public schools provisions of the bill. *Id.*, 6-8. Opponents to the bill included the Governor's Office, MEA-MFT, the OPI, the School Administrators of Montana, the MQEC, and the Montana Budget and Policy Institute. Committee on Finance and Claims Minutes (March 25, 2016), attached hereto as MDOR Ex. C.

During Executive Action on SB 410, the bill's sponsor, Sen. Llew Jones, noted that school board representatives raised concerns over the constitutionality of the bill and whether granting a tax credit for the ultimate purpose of providing scholarships to allow students to attend private religious schools was a violation of the prohibition on public aid to sectarian schools. *See,* SB 410, Senate Finance and Claims Committee Transcript, Executive Action (March 27, 2015), attached hereto as MDOR Ex. D, at 1. As a result, Sen. Jones offered two amendments to the bill, referred to as SB041007.ajc, which instructed the implementing agency as to how the bill was to be implemented. SB041007.ajc, attached hereto as MDOR Ex. E. One of those two provisions, Section 7 (codified at § 15-30-3101, MCA), provides:

> **15-30-3101.** ***(Temporary -- effective January 1, 2016)*** **Purpose.** Pursuant to 5-4-104, the legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs. The tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution.

It is clear from Sen. Jones' testimony that the Legislature intended for the bill to be implemented in a constitutional manner and the legislative instructions required the Department to administer the law according to constitutional limitations against aid to religious schools.

Art. X, § 6, Mont. Const., prohibits the use of public funds to aid sectarian schools:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

It is rare for the Legislature to specifically define in statute the purpose of a statute as applied to constitutional provisions.[1] In fact, it is unprecedented in the Montana Code Annotated for the Legislature to admonish an implementing state agency to apply the law according to constitutional provisions, without also specifically referring to the intent of those constitutional provisions.[2] The Department recognized this extraordinary prescription as it formulated rules necessary to implement SB 410, while attending to its obligations under the Montana Constitution to prevent aid to religious schools.

II. PROMULGATION OF RULE 1

The Department followed the Legislature's instructions in § 15-30-3101, MCA, and drafted ARM 42.4.802 in compliance with Art. V, § 11 and Art. X, § 6 of the Montana Constitution.

(1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:

(a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or

[1] The Legislature occasionally reiterates a constitutional provision's definition and instructs an agency to apply statutory provisions to that definition. *See, e.g.*, § 2-1-408, MCA (instructing that the Legislature is bound by the constitutional right to privacy/public's right to know balancing test when receiving documents); § 2-15-1-101, MCA (declaring that the purpose of provisions creating the structure of the executive branch of government is to comply with Art. VI, § 7 of the Montana Constitution requiring all executive and administrative offices to be allocated among 20 principal departments); § 7-3-101, MCA (defining the forms of government described in Art. XI, § 3(1) of the Montana Constitution and indicating the statutory provisions for creation of alternative forms of local governments is meant to comply with those provisions; § 20-1-501, MCA (the intent of which is to provide every Montanan opportunity to learn about the distinct and unique heritage of American Indians).

[2] A review of the entire Code reveals 274 references to the "Montana constitution," only two of which (§§ 15-30-3101 and 20-9-901) include the extraordinary instruction to the implementing agency to comply with constitutional provisions without some definition of those provisions as interpreted by the legislative body. Both references are in SB 410.

(b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

ARM 42.4.802.

Public comment at the administrative rule hearing was brisk. Proponents included several educational associations, including the Montana School Boards Association, MQEC, and MEA-MFT. Those who opposed the rule were supporters of religious schools, including national advocacy groups testifying that the bill would hurt intended recipients, students of religious schools. These opponents testified that the majority of the private schools in Montana have religious ties. Wen Fa, with the Pacific Legal Foundation, testified that 88% of private school students would be ineligible if the rule passed. *In re: Before the Department of Revenue Re the adoption of New Rule I through III*, (November5, 2015), attached hereto as MDOR Ex. F, at 34-35. Mr. Fa also confirmed that virtually all of the likely secondary school scholarship recipients of tax credit funding would be religious schools, and a clear majority of all other schools also would be religious. *Id.*, at 36. Additionally, a representative of ACE Scholarships, Jake Penwell, concluded that 57 of 65 Montana private schools [87%] partnered with ACE Scholarships "have some form of religious affiliation". *Id.*, at 51. Finally, a review of the accredited, nonpublic schools in Montana confirms that the vast majority of those private schools have ties to a religion or religious teachings. *Directory of Montana Schools*, Montana Office of Public Instruction, 194-99, attached as Ex. 1 to Quinlan Aff., attached hereto as MDOR Ex. G.

The rule, as drafted, was carefully written to have a limited effect on potential participants, and to comply specifically with Article X, § 6, which prohibits, among other things, direct and indirect appropriations or payments to religious schools. The rule does not prevent

scholarships for or to religious schools generally. It does not prevent SSOs from offering scholarships to religious schools. It does not prevent those wishing to donate from contributing directly to the religious school of their choice. It essentially only bars taxpayer funded credits being used to fund scholarships at religious schools. Denying a small subsidy to religious schools imposes no meaningful burden. Nothing prevents SSOs, from providing scholarships to religious schools in the same or greater amount as that anticipated by SB 410.

Subsequent to the Department's adoption of ARM 42.4.802, the Legislature polled its members under § 2-4-403, MCA, as means to determine whether the rule was inconsistent with their intent. Other than an opportunity for the Department to present written justification, no additional hearings were held and no public involvement was allowed or considered as part of the polling process. Whereas the intent of a bill is generally determined through the careful deliberation during a legislative session, and during which the public is invited to participate, the legislative poll is performed without deliberation or participation.

Plaintiffs have on numerous occasions argued that the language in the statute is clear and that the Department's rule is in violation of this clear language, using the legislative poll as support. *See Plaintiffs' Brief in Support of their Motion for Summary Judgment* (Pl. MSJ), at 7. Alternatively, when the appropriateness of the legislative polling process is challenged, Plaintiffs argue that the validity of the legislative poll is irrelevant. *Plaintiffs' Response to Montana Quality Education Coalition's Motion to Intervene*, at 2. To actually address whether the poll is appropriate (while arguing that the outcome of the poll supports their position) would delay the timely outcome of this case, according to Plaintiffs. This Court should carefully consider whether an unorthodox polling of the Legislature post-session is admissible or relevant evidence as to the purpose of a statute or rule.

III. PLAINTIFFS AND PROCEEDINGS BEFORE THIS COURT

The three Plaintiffs in this matter, Espinoza, Anderson, and Schaefer, have all stated that their intent is to use scholarships for their children to attend Stillwater Christian School in Kalispell, a private religious school. They have indicated in pleadings that they do not intend to send their children to any school but a Christian school. *See* Complaint. ¶¶ 78, 97-98, 110-11.

On March 31, 2016, this Court entered a preliminary injunction against the rule's implementation. To date, only one SSO has registered. *See*, Affidavit of Larry Sullivan, attached hereto as MDOR Ex. H. A total of $ 3,400 in tax credit eligible donations or pledges have been received since the inception of the program. *Id.*

ARGUMENT

I. ARM 42.4.802 IS FAITHFUL TO THE TEXT OF SENATE BILL NO. 410

As the implementing agency, the Department is obligated to follow the enacted text of the statute. The Legislature granted the Department the authority to adopt rules necessary to implement and administer the Program. § 15-30-3114, MCA. To follow the Legislature's instructions under § 15-30-3101, MCA, and for transparency of implementation, the Department adopted the rules. To comply with the strict prohibitions of Art. X, § 6, ARM 42.4.802 was necessary to avoid a constitutional violation of the prohibition against aid to sectarian schools, and to avoid the advancement or public subsidy of religious education.

The Montana Administrative Procedures Act (MAPA), codified at § 2-4-305(5), MCA, requires that for a rule to be effective, "each substantive rule adopted must be within the scope of authority conferred . . . ." Additionally, a rule must be "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." § 2-4-305(6), MCA. The authority conferred in SB 410 is prescribed by § 15-1-3101, MCA. The Department's rule is both consistent with the Constitution and reasonably necessary to effectuate the purpose of the

statutes by complying with the very strict limits against aid to sectarian schools. Plaintiffs' argument that the Department's rule is *ultra vires* as contradictory to the definition of a "qualified education provider" and the Montana Constitution, is without merit. "Great deference and respect must be shown to the interpretations given the statute by the officers and agencies charged with its administration." *Montana Contractors' Association*, 220 Mont. at 395, 715 P.2d at 1058. The Department faithfully and correctly applied the Montana Constitution to SB 410 and followed the Legislative mandate set forth in § 15-1-3101, MCA.

Plaintiffs suggest that the Department should disregard the plain text of the constitutional proviso in SB 410 because of the legislative poll taken in November 2015. However, to assume the poll is controlling raises several concerns. First, a poll of the legislature, outside of the general course of legislative business, is conducted with no debate and no public input. Sessions of the legislature must include committee meetings and must be open to the public. Mont. Const. art. V, § 10(3). A legislative poll attempting to determine the intent of its members after passage of a bill may be in violation of this requirement. The Legislature directed the Department to follow Art. X, § 6, an edict which would have to be ignored if the Department followed the results of the poll. The constitutional proviso in § 15-30-3101, MCA, would be superfluous if the Legislature meant for it to be ignored. When determining legislative intent, a court presumes that the legislature would not pass meaningless legislation. *Montana Contractors'*, 220 Mont. at 395, 715 P.2d at 1058; *Albright v. State*, 281 Mont. 196, 206, 933 P.2d 813, 821 (1997). "In construing a statute, the whole act must be read together and where there are several provisions or particulars, a construction is, if possible, to be adopted that will give effect to it all." *Larson v. Crissmore*, 228 Mont. 9, 15, 741 P.2d 401, 405 (1987). To raise the legislative poll above the text of the statute is outside the bounds of the rules of statutory construction.

Plaintiffs' reading of the legislative poll as authoritative notwithstanding the plain meaning of the enacted statute, which would in effect repeal the constitutional proviso outside of any legislative session, raises significant separation of powers issues. *See* Mont. Const., art. III, § 1. The duties of the Legislature with respect to a bill end when the legislative body adjourns *sine die*. The Legislature delegated authority for implementing SB 410 to the Department and instructed the Department to apply the bill according to constitutional limitations. The Legislature cannot countermand this delegation of authority by using a simple vote of its members through an unorthodox poll outside of session to influence the Department's implementation of the bill. *See, State ex rel. Judge v. Legislative Fin. Comm.*, 168 Mont. 470, 453 P.2d 1317 (1975). Additionally, the requirement in § 2-4-404, MCA, that the poll must be admissible in court and is conclusive evidence raises separation of powers issues. It is not within the power of the Legislature to determine the evidentiary value of the poll. Only the judiciary has the power over the courts and the rules governing the courts' procedures. Mont. Const. art. VII, §§ 1 through 3.

Even without the Legislature's instructions to follow the Constitution, the Department and its employees have an independent obligation to faithfully comply with the Montana Constitution. Mont. Const., art. III, § 3, requires all executive offices to "support, protect, and defend" the U.S. and Montana Constitutions, discharging the duties of their office with fidelity. This duty cannot be ignored in the face of statutory language that will cause a violation of the Constitution the officer has sworn to defend, if not for adoption of ARM 42.4.802. Just as the governmental agency has an affirmative duty to conduct a constitutional balancing test between the right to know and the right to privacy when determining the confidentiality of records, an implementing agency has a constitutional duty to faithfully implement a statute according to the Constitution. *See Great Falls Tribune v. Montana Public Service Commission*, 2003 MT 359, 82

P.2d 876. Thus, as the Department has faithfully implemented SB 410, the Court should deny Plaintiffs' motion for summary judgment and grant the Department's cross-motion for summary judgment.

II. THE MONTANA CONSTITUTION PROHIBITS PUBLIC FUNDING OF RELIGIOUS EDUCATION THROUGH TARGETED TAX CREDITS

When reviewing Art. X, § 6, it is important to consider its purpose as part of a whole under Article X and the relationship of all of its provisions. The purpose of Article X is to guarantee equality of educational opportunity to each person. Mont. Const., art. X, § 1(1). As part of that guarantee, the legislature must provide "a basic system of free quality public elementary and secondary schools." Mont. Const., art. X, § 1(3). Discrimination in public education is prohibited. Mont. Const., art. X, § 7. The Constitution, however, makes no guarantee to education of students whose parents choose to enroll their children in private religious schools.

The Constitution is very consistent in its separation of public education and private education. Neither students nor teaches are required to take a religious test for admission to public schools, and no sectarian tenets can be advocated in any public institution of learning. *Id.* The Constitution prohibits state sources of funding being used for any religious educational purpose, strictly prohibiting any funding or payments to schools tied to a religion or sect. Mont. Const., art. X, § 6. It is clear that the framers intended that the state steer clear of any joining of religious and state purposes.

When the Montana Constitution was drafted and adopted in 1972, the drafters were sensitive to the separation of church and state: "The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Mont. Const., art. II, § 5. The Constitutional Convention occurred at the height of the national separationist movement. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (the Court disallowed a 15% supplement to salary of

nonpublic teachers as an excessive entanglement between government and religion). *See also* Montana Constitutional Convention, Delegate Monroe, Trans. V., attached hereto as MDOR Ex. I, at 1646-47 (discussing the adoption of identical language to the federal First Amendment and its relationship to public aid to church-related schools). It is against this strong separationist background that the people of Montana ratified the new Constitution in 1972, and particularly Art. X, § 6.

The doctrine of separation of church and state is replete in the Constitution. For instance, the Constitution prohibits appropriations for religious purposes to any private individual, association, or corporation. Mont. Const., art. V, § 11(5). Alternatively, the framers considered and provided for exceptions, such as granting discretion to the Legislature with respect to property tax exemptions in Mont. Const., art. VIII, § 5(1)(b), for " . . . places for actual religious worship, and property used exclusively for educational purposes." There is no such exemption or discretion for funding of education in religious schools; instead, there is a broad prohibition against public financial aid to religious school.

The U.S. Supreme Court has recognized the "difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." *Everson v. Board of Education*, 330 U.S. 1, 14 (1947). The Constitution consistently draws the line of separation between church and state. Montana's constitutional provision disallowing direct or indirect appropriations or payments to religious schools follow the strict tenet against aid to religious schools and the Department's rule was clearly implemented to draw the line between providing funds to the general public and providing expenditures in the form of tax credits with the purpose or effect of supporting religious institutions. It is clear that the Department followed the intent of the Constitution and

has implemented the program according to the limits of Art. X, § 6. Summary judgment in favor of the Department is proper.

A. Art X, § 6 is Not a Blaine Amendment Discriminating Against Religion.

Plaintiffs loosely compare Montana's religious aid prohibition with other states' similar language, concluding that each of these provisions is a "Blaine Amendment," traditionally, a negative response to Catholic demands for equal financial support to public schools that included Protestant prayers and readings from the King James Bible. *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State*, 77 Mont.L.Rev. 41, 43 (2016), attached hereto as MDOR Ex. J. While it is true the language in Montana's 1889 Constitution was tied to the trend of Blaine Amendment, the 1972 Constitution delegates drafted the language in Art. X, § 6 for clearly different reasons. Plaintiffs' continuing negative references to Art. X, § 6 as a Blaine Amendment, are misplaced, inaccurate, and create a negative view of the delegates' purposes for the state's prohibition against aid to religious schools.

The wording of Art. X, § 6, did not change dramatically in the 1972 Constitution, but the purpose for the language clearly did, which is obvious when a review of the discussion among the constitutional delegates is conducted. *Id.* Delegate Burkhardt moved for adoption of Art. X, § 6. On behalf of the committee, he stated it is important for the "growth of a strong, universal, and free educational system", and that "[a]ny diversion of *funds or effort* from the public school system would tend to weaken that system in favor of schools established for private or religious purposes." Constitutional Convention Trans. VI, attached hereto as MDOR Ex. K, at 2009 (emphasis added). Delegates testified their concerns about the negative intent of the 1889 Blaine Amendment language. MDOR Ex. K, at 2010. Some of these delegates supported a minority proposal that would have removed "indirectly" from the section. However, these same

concerned delegates ultimately voted for a compromise that retained "indirectly", included an exemption for the use of federal funds for private schools, and retained the section's strict prohibition language. MDOR Ex. J, at 48-50.

The delegates to the Constitutional Convention recognized the "overwhelming rigidness of the clause during their debates and intentionally retained its strict provisions." *Id.*, at 58. Plaintiffs' arguments or inferences that Art. X, § 6 should not be enforced because it has connections to the national Blaine Amendment and its anti-Catholic bigotry should be refused. The law review article's author, Michael P. Dougherty, indicates that there is no evidence to suggest that the current provision has ties to the Blaine Amendment movement and, furthermore, numerous delegates who expressed concerns about the language on these grounds ultimately voted for § 6. *Id.*, at 53. Additionally, Dougherty noted that other jurisdictions have rejected this argument for lack of evidence. *Id.*, at 53-54, citing *Bush v. Holmes*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004). The purpose of the new Constitution's language has a different intent than the original Montana provision.

Retaining the language prohibiting aid to religious schools was important to Montana's religious leaders who also cautioned against the state's interference with religious schools' teachings. Delegate Harper, a respected Methodist minister, testified that when the state and any church "get mixed up, it always seemed to work to the detriment of both . . . ." MDOR Ex. K, at 2012. Delegate Harper later reiterated the important principle of separation of church and state for a different reason: "it's very difficult of a church supported by a state to be critical of the state, as I think a church should be." *Id.*, 2021. He followed by asking the delegates where in the new provisions there was a section prohibiting the state's sponsoring or giving money to aid private education and was informed that it was in Art. X, § 6. *Id.*, at 2022. Delegate Conover stated that representatives of church denominations told him they were "very, very

opposed to any public money." *Id.*, at 2016. He stated they "wanted no aid from no taxes or any allocation of any kind. . . . We are the ones that's running it, and we don't want nobody [sic] to interfere with us." *Id.*, at 2017; *see also* MDOR Ex. J, at 51-52. Delegate Conover and Delegate McNeil were so concerned to keep the separation of church and state that they even voted against religious schools' receipt of federal funds. *Id.* Those delegates carrying the banner protecting churches against the state's interference were very clear that they wanted to keep a strict separation of church and state, including the refusal of public funds so as to avoid overreach by the government. The Plaintiffs argue the opposite effect, to require that public funds be used to aid religious schools.

B. Under Plaintiffs' Reading, the Tax Credit Would Result in an Indirect Payment to Religious Schools.

On its face, Art. X, § 6 enjoins any direct or indirect aid to religious schools. The Constitutional Convention volumes clearly indicate that Montana's express prohibition against aid to religious schools is the strictest in the country. MDOR Ex. J, at 52. The prohibition is meant to include even student benefit provisions.

1. Tax credits for religious education are indirect payments within the original meaning of Art. X, § 6.

The Montana Constitution provides:

> **Section 6. Aid prohibited to sectarian schools.** (1) The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of . . . other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

Mont. Const. Art. X, § 6. The Department drafted and adopted ARM 42.4.802 to avoid the payment of public funds, whether direct or indirect, to private religious schools. If provided a scholarship, Plaintiffs will use scholarships for a religious purpose--to attend religious schools--which, in turn, indirectly funds religious schools. Plaintiffs argue that the tax credit scholarships

are not given to the religious entity, but are given to the family who help pay tuition at the school of their choice. *Pl. Brf. In Supp. Of Motion for S.J.*, at 12. However, Plaintiffs ignore that the families receive no money. Section 15-30-3104, MCA, requires the SSO to deliver the scholarship funds directly to the school, not to the student. The payments, therefore, directly benefit the school, in violation of Art. X, § 6.

Plaintiffs' student benefit argument was addressed and ultimately rejected by the delegates at the Constitutional Convention. Montana Constitutional Convention Delegate Proposals, attached hereto as MDOR Ex. L, at 744-45; *see also* MDOR Ex. J, at 56. A minority of the delegates moved to delete "indirectly" from § 6 to make funds available under the United States Supreme Court's support of the "student benefit theory," the very theory espoused here, that as long as the government monetary benefits directly support children and not schools, there would be no violation of the Establishment Clause. *Id.* However, because "indirect" was ultimately retained in § 6, the student benefit theory was rejected and carries no weight in Montana. Scholarships paid on behalf of students directly to religious schools is exactly the form of indirect payment to a religious school that the delegates intended to prohibit under Art. X, § 6. The circuit breaker performed by ARM 42.4.802 is consistent with and true to the Montana Constitution.

As previously stated, the delegates to the Constitutional Convention debated at length the purpose of Art. X, § 6, and considered softening its prohibition to allow for indirect aid to religious schools. Citing the need for strict separation between church and state and championing the guarantees of a free quality public education, the Constitution's drafters chose to retain "indirect" in § 6. *Supra*, II.C.2. Furthermore, as part of that discussion, the delegates rejected indirect aid through a student benefit theory, a theory identical to Plaintiffs' view of the SB 410 Program. Under the original meaning of Art. X, § 6, a tax credit targeted to provide

scholarships intended to be for the benefit of the student and to be paid directly to the school is an unconstitutional indirect payment. Clearly, the Department's rule avoids an unconstitutional application of SB 410.

2. The predominant beneficiaries of SB 410 are indisputably religious schools.

According to Plaintiffs and other opponents to ARM 42.4.802, nearly all of the $3 million in tax credits set aside for the scholarship program overwhelmingly will be paid to religious schools. *Brf. In Supp. Of Motion for S.J.*, at 1-2; *Supra*, 7-8. In fact, Plaintiffs allege by way of affidavit and the affidavit of their own attorney that many Montana families looking to send their children to nonpublic school have only religious schools available in their community. *Brf. In Supp. Of Motion for S.J.*, at 1-2. Each of the Plaintiffs states that they have enrolled their children in religious school and do not intend to send their children to any school but a Christian school. Complaint. ¶¶ 78, 97-98, 110-11. The very limited record that the Court has so far reveals that the effect of Plaintiffs' reading of the legislation and the intent of its participants is to provide scholarships to religious schools. *See* Uhl, Baumgarner, Pulis, and Makowski, Affidavits. Dr. Timothy Uhl is the Superintendent of Catholic Schools for Montana two dioceses. He represents the 24 Montana Catholic schools and the students who would apply for scholarships. Uhl Affidavit, at 2. Christian Baumgarner is the Director at Mission Valley Christian School in Polson, serving 81 students. Baumgarner Aff, at 2. By Plaintiffs' own admission, religious schools are the vast majority of nonpublic schools that will benefit from their interpretation of SB 410 without ARM 42.4.802. By their own admission this tax has the purpose and effect of targeting religious schools.

3. The Courts' view of targeted tax credits would not allow for indirect payments to religious education

Plaintiffs insist that courts have established that scholarships generated from donations for tax credits is a constitutional form of aid to religious schools because tax credits are not

public appropriations under Mont. Const. art. V, § 11(5), and are not indirect appropriations under Mont. Const. art. X, § 6.[3]

No Montana court has ruled on the question of the relationship of a tax credit as an indirect appropriation, payment, or grant to religious schools when applied to Art. X, § 6. Additional legal support exists for the argument that a tax credit is a substitute for an indirect appropriation, payment, or grant.

Plaintiffs argue that scholarships granted for a tax credit, like that allowed in SB 410, is never the state's money, insisting that no money is ever appropriated or paid to the religious school, except from the contributor's pocket. In support, Plaintiffs rely on the statements of the First Judicial District Court that a tax credit is not an appropriation. *MEA-MFT v. McCullough*, 2012 Mont. Dist. LEXIS 20 (Cause No. BDV-2011-961). This decision, which was not reviewed by the Supreme Court, did not address the relationship of a tax credit to the Legislature's budgetary process, which reveals a much more complicated relationship between tax replacement programs and the making of a budget. Additionally, the Court in *MEA-MFT* did not address whether a tax credit for scholarships to religious schools violates Art. X, § 6. This is, therefore, a question of first impression in Montana.

The First Judicial District in *MEA-MFT* looked to the Supreme Court's discussion in *State ex rel. Bonner v. Dixon*, 59 Mont. 58, 195 P. 841 (1921), to determine that a tax credit is an appropriation. However, the Court's finding just scratches the surface, and did not consider the type of aid prohibited under Art. X, § 6. Additionally, the language that the *MEA-MFT* Court relied on in *Bonner*, is of particular application to SB 410: "The word 'appropriations,' as used in the Constitution, means the setting apart of money in the state treasury for a specific purpose

[3] It is unnecessary for the Court to reach a conclusion on the application of Mont. Const. Art. V, § 11(5). This case does not hinge on application of that provision. The issue for the Court to consider is whether the tax credit program is a violation of the prohibition against any state aid to religious schools under Art. X, § 6.

after it has been placed therein or duly provided for." *Bonner*, 59 Mont. at 78. Because tax credits are tax expenditures, the act of the Legislature's determination to cap tax credits at $3 million is the act of setting aside public funds for a particular purpose, to indirectly aid religious schools, after it has been duly provided for.

More importantly, the Department is not arguing at this time that the tax credit is an appropriation under Art V, § 11(5), and the Court need not address this issue. The issue here is whether this falls within the much broader "indirect payment" provision of Art. X, § 6. The Montana Supreme Court has not addressed this issue directly, but members of the Court have recognized the importance of the "necessity to maintain Montana's public school systems apart from any entanglements with private sectarian schools and to guard against the diversion of public resources to sectarian public purposes." *Kaptein v. Conrad Sch. Dist.*, 281 Mont. 152, 164, 931 P.2d 1311, 1318 (1997) (Nelson, J., concurring). In *Kaptein*, a student attending Conrad Christian School argued that she had a fundamental right to participate in the public school system's athletics. The majority disagreed pursuant to Art. X, § 1 of the Montana Constitution. Justice Nelson, joined in a concurring opinion by Justice Leaphart, and in part by Justice Gray, agreed with the majority's decision, but also added that under Art. X, § 6, allowing the student to participate in the school district athletics would have been "providing aid, either directly or indirectly, to the Conrad Christian School in violation of this express prohibition of Montana's Constitution. *Id.*, at 164. In addition, Justice Nelson noted that it was the Constitutional Convention delegates' belief that public school should remain separate from private schools to avoid entanglement and "to guard against the diversion of public resources to sectarian school purposes." *Id.* He also recognized that "Montana's constitutional prohibition against aid to sectarian schools is even stronger than the federal government's." *Id.* Justice Gray followed with her own analysis that "federal and sister state cases . . . have no application to the

unique and broad proscription contained in the Montana Constitution regarding aid to sectarian schools." *Id.*, at 166. This is a view into the Supreme Court's interpretation of whether the tax scholarship program here should be considered an indirect appropriation or payment in violation of Art. X, § 6.

In *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125 (2011), the U.S. Supreme Court found that Arizona taxpayers did not have standing to sue because Arizona's tax credit program for providing scholarships to students attending private (including religious) schools was not a governmental expenditure. In that 5-4 decision, the majority did not directly address the issue of whether a tax credit is an appropriation, instead, holding that plaintiff-taxpayers challenging the program did not have standing, summarily concluding that a tax credit is the taxpayer's money and not the government's. *Id.* In her dissent, however, Justice Kagan concluded that there is no difference between cash grants given by the government and targeted tax breaks--that each provides financial support to select individuals or organizations. *Winn*, 563 U.S. at 148 (Kagan, J., dissenting). While discussing her objection to the majority's decision that a taxpayer has standing to challenge state subsidies to religion when there is a public appropriation but not when it is administered through a target tax break, Justice Kagan noted that a targeted tax break (such as a tax credit) is a tax expenditure.

> "Tax expenditures" are monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment . . . the various deductions, credits and loopholes that are just spending by another name . . . tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, preferential rate of tax, or deferral of tax liability . . . government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms of government assistance.

Id., at 151 (internal citations omitted).

If reviewed from a perspective of economics and budgetary analysis, a tax credit is an expenditure, and there is little or no difference between a state's expenditure through a grant

program and that provided by a targeted tax credit program to fund religious education. In either, there is a significant financial impact to the state coffers and less funding for other governmental programs. The tax credit here is a tax expenditure and is indirect aid to religious schools in violation of Art. X, § 6.

Other states' cases cited by Plaintiffs are distinguishable from the current matter because these cases do not take into account the broad reach of Montana's constitutional prohibition, as described by Justices Nelson and Gray, and thus do not inform the interpretation and application of Montana's prohibition of aid to religious schools. Some of these cases are further distinguished because their state constitutions do not contain the prohibition against direct *and* indirect aid to religious schools found in the Montana Constitution. *E.g., compare* Ariz. Const. Art. II, § 12 and Mont. Const. Art. X, § 6. The delegates to the Constitutional Convention discussed the strict nature of the prohibition and in the summary of that Convention, Mr. Dougherty, describes the prohibition as the strictest in the nation. None of the cases cited by Plaintiff therefore apply. The Court should reject application of those cases to this case and reject Plaintiffs' motion for summary judgment.

4. The function of tax credits as tax expenditures.

The Montana Legislature has defined tax expenditures as "those revenue losses attributable to provisions of Montana tax laws that allow a special exclusion, exemption, or deduction from gross income or that provide a special credit, a preferential rate of tax, or a deferral of tax liability . . . ." § 5-4-104(2), MCA. As an example of a tax expenditure, the legislature specifically listed "credits allowed against Montana personal income tax or Montana corporate income tax." § 5-4-104(2)(d), MCA.

Dan Dodds, Ph.D., is a Senior Economist with the Department of Revenue. His employment with the Department began in 2000 and, for many years prior to that, he was an

economist for the state of Washington. He received his doctorate in natural resource economics and economic theory from the University of Wisconsin in 1980. Dodds Affidavit., attached hereto as MDOR Ex. M, at 1.

According to Dr. Dodds, the definition in § 5-4-104(2), MCA, is modeled on the definitions promulgated by the United States Treasury in 1968 and adopted by Congress in the Budget and Impound Control Act of 1974. MDOR Ex. M, at 1. Dr. Dodds discusses additional authority describing the process:

> [An income tax system is] composed of two elements. The first element contains the structural provisions necessary to the application of a normal income tax, such as the definition of net income . . . . These provisions compose the revenue raising aspects of the tax. The second element consists of the special preferences found in every income tax. These special preferences, often called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class of persons. They partake of many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax or special rates. Whatever their form, these departures from the "normative" income tax structure essentially represent government spending for the favored activities or groups made through the tax system rather than through direct grants, loans, or other forms of government assistance."

MDOR Ex. M, at 1-2; *citing* Stanley S. Surrey and Paul R. McDaniel, "*The Tax Expenditure Concept and the Budget Reform Act of 1974,*" Boston College Industrial and Commercial Law Review 16(5), p. 680 (June 1976).

"Tax expenditures affect the state budget in exactly the same way as direct expenditures . . ." MDOR Ex. M, at 3. Dr. Dodds explains that both the federal government and the state legislature implement laws that are either direct spending programs or a tax subsidy program, or in some cases both, as is the case with the Insure Montana Program. § 33-22-2001, *et seq.*, MCA. He points out that under this program, a small employer may choose either a direct subsidy and receive a direct payment, or the small employer may choose a tax credit which is

counted as a payment of part of the employer's tax liability. MDOR Ex. M, at 2-3. The effect on the state's budget is the same.

In this case, the tax credits under § 15-30-3111, MCA, are tax expenditures that may ultimately reduce the ending fund balance by $3 million. The Legislature clearly considered the financial impacts of the amount of money that would not be available for other state purposes by creation of the tax credit program. The state's budget is too greatly affected to conclude that there is no aid to religious schools. Knowing the effect of tax credits to the budget, the Legislature would not want to jeopardize the program by unconstitutionally requiring tax credits for scholarships paid to religious schools. To avoid this, the Legislature included the Constitutional proviso.

The Legislature treated SB 410 as an appropriation bill. First, SB 410 was not debated in either the Senate or House tax committees. Instead, it was briefly referred to the Senate Education and Cultural Resources Committee, but before it was heard, wound a path through both Senate Finance and Claims Committee and, with a slight deviation in the House Education Committee, through the House Appropriations Committee. Second, the Office of Budget Program and Planning's Fiscal Note anticipated that the loss to the General Fund revenue will be $2.2 million for fiscal year 2016, climbing to over $3.7 million annually by 2019. MDOR Ex. A. Third the Legislature's determination to cap the number of credits at $3 million clearly shows that the credits are an expenditure, and a loss to other state programs. *Id.*, at 5. Plaintiffs misread the plain text of SB 410, including the constitutional proviso to require tax credits to provide indirect financial aid to religious schools. This would be an unconstitutional reading of the law and is inconsistent with the best reading of the statute.

Plaintiffs argue that if the Court finds that ARM 42.4.802 is constitutional, upholding the prohibition against aid religious schools, other tax credits and/or deductions are at risk. *Brf. In*

Supp. Of Motion for S.J., at 10-11. However, SB 410 is distinguishable from other types of tax credits. First, Plaintiffs make this argument with respect to Art. V, § 11(5), which prohibits direct appropriations to private individuals or organizations for religious, charitable, or educational purposes. Because there is clearly an indirect payment under Art. X, § 6, there is no need to address Art. V, 11's prohibition. Second, none of the other tax credits raised by Plaintiffs are being challenged and, therefore, should not be considered in this case. Third, the tax credits mentioned by Plaintiffs, such as the Qualified Endowment Credit, are general tax credits that do not directly state that the credit is for donations to religious schools. Fourth, the property tax exemptions Plaintiffs argue would be at risk are governed by Mont. Const. art. VIII, § 5(b), which specifically provides discretion to the legislature to provide property tax exemptions to institutions of purely public charity, hospitals, and places for actual worship. These other credits and deductions are clearly distinguishable from this tax credit, which without the rule, would be targeted to aid religious schools in violation of Art. X, § 6. If the Court adopts Plaintiffs' reading of the law, and in absence of the constitutional proviso, then the purpose and effect of this tax credit would be to fund religious schools through a tax credit program, despite its facial neutrality. As written and implemented by the Department, it is a tax credit available for scholarships for private school, with the limitations under Art. X, §6.

The plain meaning of Art. X, § 6, the history as provided through the Constitutional Convention, the Legislative history, and the Montana Supreme Court's consideration of § 6 all lead to the conclusion that ARM 42.4.802 is necessary to constitutionally apply SB 410, and that the Department has correctly done so. The Plaintiffs have failed to meet their burden that the Department's rule is unconstitutional beyond a reasonable doubt. The record is clear that with the rule, SB 410 is constitutional as applied. For these reasons, the Plaintiffs' motion for

summary judgment should be denied and the Department's motion for summary judgment should be granted.

C. SB 410 as Implemented by Rule 1 is Constitutional

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment and Free Exercise clauses "are frequently in tension." *Locke v. Davey*, 540 U.S. 712, 718 (2004). Yet, the U.S. Supreme Court has long said that "there is room for play in the joints between them." *Id.* (Internal quotation marks omitted).

1. Rule 1 saves SB 410 from an Establishment Clause violation

Lemon provides the test to analyze government conduct under the Establishment Clause and Article X, Section 6 of the Montana Constitution: (1) the statute must have a secular purpose; (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Establishment Clause was intended to avoid the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 612. If the statute fails any one of the *Lemon* test elements, it constitutes impermissible establishment.

Here in Montana, Plaintiffs' interpretation of SB 410 would have the purpose of advancing religion if not for the Rule 1 reading of the constitutional proviso. The first prong of the *Lemon* test requires a statute to have a secular purpose. *Id.* at 612. A court must determine whether the State's actual purpose is to endorse religion. *Big Sky Colony, Inc. v. Mont. Dept. of Labor and Indus.*, 2012 MT 320, ¶ 45, 368 Mont. 66, 291 P.3d 1231. The question is whether the State as a whole is establishing religion. The Department is able to avoid establishment by giving SB 410 its most reasonable reading despite some of its supporters' intent that the program serve as a vehicle primarily to advance religious education in Montana. Furthermore, those

interpreting laws, including the Department, are obligated to avoid constitutional questions. *See Wolfe v. State, Dept. of Labor & Ind.*, 255 Mont. 336, 339, 843 P.2d 338, 340 (1992) (citing *Ingraham v. Champion Int'l*, 243 Mont. 42, 46, 793 P.2d 769, 771 (1990)); *State v. Still*, 273 Mont. 261, 263, 902 P.2d 546, 548 (1995). The alternative to separation is the Department's endorsement and administration of a program it knows (based on public comment) would predominantly advance religion.

Furthermore, if not for Rule 1, Plaintiffs' interpretation of SB 410 would have the primary effect of advancing religion. The second prong of the *Lemon* test requires a court to consider whether the primary effect of the statute advances or inhibits religion. *Lemon*, 403 U.S. at 612. The Montana Supreme Court evaluates the primary effect of a statute from the perspective of a "reasonable observer." *Big Sky Colony*, ¶ 47 (citing *Kreisner*, 1 F.3d at 784). In evaluating the primary effect, a court must consider "whether it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion." *Id.* Enrollment in eligible schools is overwhelmingly religious. Of the 13 nonpublic schools accredited by the Montana Board of Public Education, eight (61.5%) of the schools are religious. MDOR Ex. G. Of the 127 nonpublic schools reported to county superintendents, 89 (70.1%) of the schools are religious. *Id.* Of the 140 nonpublic schools, 97 (69.3%) of the schools are religious. *Id.* Further, in considering the private schools available to students by county, in ten Montana counties, the exclusive effect of Plaintiffs' reading of SB 410 would be to fund religious education. *Id.* Not only would a reasonable observer take the law to endorse religion, but in its deliberations the legislature itself saw that this would have been the effect. To avoid this effect, the legislature added the constitutional proviso in § 15-30-3101, MCA.

In addition, opponents who testified at the Rule 1 hearing indicate that a large percentage of schools who would benefit from Plaintiffs' interpretation of SB 410 are religious. Wen Fa of the Pacific Legal Foundation testified that only one-third of private schools would be eligible to participate in the Program if Rule 1 was adopted. MDOR Ex. F, at 34:14-34:23 (Nov. 5, 2015). Further, Mr. Fa testified that 88 percent of Montana private school students would be ineligible for the tax credit scholarship due to the disallowance of religious schools from participating in the program. *Id.* at 34:24-35:2. Indeed, Mr. Fa opined that Montana high school students would be ineligible to use scholarships due to the disallowance of religious school participation. *Id.*, at 35:2-35:12. In addition, Jake Penwell, Montana State Director of ACE Scholarships, testified that 57 out of 65 of ACE's private school partners maintain some form of religious affiliation. *Id.*, at 50:22-51:5. Mr. Penwell further testified that there are "2,700 empty seats in these faith-based schools waiting to be filled." *Id.*, at 51:7-51:8. Finally, Plaintiffs admit that "[a]pproximately 69 percent of Montana's private schools are religious" and that "many Montana families do not even live near a nonreligious private school or only live near one that teaches elementary school." *Plaintiffs' Brief in Support of their Motion for Summary Judgment,* at 1. Based upon this data, testimony, and Plaintiffs' own assertions, the primary effect of Plaintiffs' reading of SB 410 is to advance religion because it appears to the reasonable observer that the State is endorsing religion. Thus, to prevent the advancement of religion, the Department followed the Legislature's mandate and adopted Rule 1.

Finally, Rule 1 avoids entangling the Department in religious questions. The third prong of the *Lemon* test requires a court to determine whether the statute results in an "excessive entanglement with religion." *Lemon*, 403 U.S. at 613. The excessive entanglement criteria "seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Big Sky Colony*, ¶ 49 (quoting *Cammack v. Waihee*, 932 F.2d

765 (9th Cir. 1991)). Constitutional Convention delegates from religious denominations expressed the intent to keep government aid out of religion and did not want government involved with "church work." 6 Montana Constitutional Convention Transcript, attached hereto as MDOR Ex. K, at 2016-17 (1981). In addition, delegates did not adopt an amendment to Article X, Section 6, which would have removed the "indirect" language and allowed aid to be permissible under the "child-benefit theory." *See Id.*, at 2010-11. Finally, the Program directs money that otherwise would be used for public schools or other public uses to religious schools, thus, allowing religious interests to interfere with secular affairs. *See* MDOR Ex. K. Accordingly, Rule 1, as it implements § 15-30-3101, MCA, prevents the Department from interfering with the affairs of religious institutions and prevents religious institutions from interfering with State affairs. Based upon the foregoing, the Court should deny Plaintiffs' Motion for Summary Judgment and grant the cross-motion for Summary Judgment in favor of the Department.

2. Rule 1 does not prohibit the free exercise of religion

No United States Supreme Court or Montana Supreme Court case has required, as opposed to permitted, public subsidies for religious education. *See generally Trinity Lutheran Church v. Pauley*, 788 F. 3d 779, 784 (8th Cir. 2015), *cert granted*, 135 S. Ct. 891 (2016); *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999), *cert denied*, 528 U.S. 931 (1999); *see also Bronx Household of Faith v. Bd. of Educ. Of City of N.Y.*, 750 F.3d 184, 198 (2d Cir. 2014), *cert denied*, 135 S.Ct. 1730, 2015 WL 1400936 (2015); *Eulitt ex rel. Eulitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004). Instead, the U.S. Supreme Court holds that, despite the frequent tension between the Establishment and Free Exercise causes, "there is room for play in the joints" between them. *Locke*, 540 U.S. at 718 (citing *Walz v. Tax Comm'n of City of New*

York, 397 U.S. 664, 669 (1970)). Specifically, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.*

Locke stands for the proposition that government can choose how it wants to spend taxpayers' money and the extent, if any, it wants to aid religion. The Washington scholarship program at issue in *Locke* codified the state constitution's "prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'" *Id.* at 716. The question before the Court was "whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry . . . can deny them such funding without violating the Free Exercise Clause." *Id.*, at 719. The Court answered the question in the affirmative and held that Washington's interest in not funding scholarships for devotional degrees pursuant to its constitution was "substantial" and the exclusion of devotional degree scholarship funding was "a relatively minor burden" on scholarship recipients. *Id.*, at 725.

Here, ineligibility for a $150 tax credit is also "a relatively minor burden." Rule 1 does not prevent religious schools from obtaining scholarships not funded by the Program's tax credits. The rule does not bar children from enrolling in religious schools. The rule does not prohibit individuals from donating directly to religious institutions. The rule only bars taxpayer funded credits aiding religious schools; it simply enforces the State's substantial interest in not providing aid to religious schools. *See* Mont. Const. Art. X, § 6.

Furthermore, despite Plaintiffs' claim that *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) stands for the proposition that any law discriminating against religion is presumptively unconstitutional, the U.S. Supreme Court and other courts have rejected this claim of presumptive unconstitutionality. *Locke*, 540 U.S. at 720 ("[Davey] contends that under the rule we enunciated in [*Lukumi*] the program is presumptively

unconstitutional because it is not facially neutral with respect to religion. We reject this claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning."); *Bronx Household*, 750 F.3d at 190-97; *Eulitt,* 386 F.3d at 355-356. Instead, the *Lukumi* decision declared the principle that "government, in pursuit of legitimate interests, cannot in a selective manner impose *burdens* only on conduct motivated by religious belief," thus justifying strict scrutiny. *Lukumi,* 508 U.S. at 543 (emphasis added); *see also Bronx Household*, 750 F.3d at 190-197*; Eulitt,* 386 F.3d at 355-56. The U.S. Supreme Court enunciated the following factors a court may consider in determining whether a law is motivated by religious animus: "whether the state action in question imposes any civil or criminal sanction on religious practice, denies participation in the political affairs of the community, or requires individuals to choose between religious beliefs and government benefits." *Eulitt,* 386 F.3d at 355 (citing *Locke*, 540 U.S. at 720-21). Rule 1 is not motivated by religious animus. The rule does not impose any civil or criminal penalty. It does not impede political participation. It does not require residents to forego religious convictions in order to receive the benefit of a secular education offered by the state. It does not burden religion in any way; it merely limits the availability of a $150 tax credit to ensure private religious education in Montana is not being indirectly funded with money that would otherwise be in the state treasury.

Indeed, there are crucial differences between the facts in *Lukumi* and those in the present case. First, the *Lukumi* ordinances, by prohibiting the religious ritual's performance in the city, were intended to and did suppress a religious ritual of a particular faith. *Lukumi*, 508 U.S. at 534-35. Rule 1 does no such thing. The rule does not prevent religious education, does not prevent attendance at a religious school, and does not prevent religious education of children in Montana. Indeed, the Plaintiffs in this case continue to send their children to religious schools,

even without the availability of scholarships. The rule only represents a decision by the State not to provide aid for religious education. Second, the ordinances in *Lukumi* were motivated by the city's disapproval of the targeted religious practice. *Id.* at 542-45. The State has no such motivation. The State's sole reason for excluding religious schools from the Program is that it would run a meaningful risk of violating Article X, Section 6 of the Montana Constitution. Finally, "[i]t would be illogical to impose upon government entities a presumption of hostility whenever they take into account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the religion clauses." *Eulitt*, 386 F.3d at 355. Thus, the *Lukumi* decision cannot bear the weight that Plaintiffs place upon it, and it is not controlling in this matter.

Furthermore, Plaintiffs' argument that erroneous interpretations of constitutional provisions do not constitute a compelling government interest is not persuasive because the constitutional provisions at issue in *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008); *Columbia Union College v. Oliver*, 254 F.3d 496, 510 (4th Cir. 2001); and *Christian Sci. Reading Room v. Airports Comm.*, 784 F.2d 1010, 1013-14 (9th Cir. 1986), did not contain language comparable to Montana's provision prohibiting direct and indirect aid. Indeed, the Colorado provision had been previously interpreted by Colorado's supreme court to allow scholarships to students, but to prohibit direct subsidies to religious institutions. *Colorado Christian Univ.*, 534 F.3d at 1268. Here, the Montana Supreme Court has not authoritatively interpreted Article X, Section 6 of the Montana Constitution as it relates to the pending matter, and, thus, Plaintiffs' claim that the Department's interpretation is erroneous is premature and not supported. Finally, *Columbia Union College* and *Christian Sci. Reading Room* do not consider application of the U.S. Supreme Court's reasoning in *Locke* that state constitution establishment provisions may be more restrictive than the U.S. Constitution.

Turning to Montana, a regulation impermissibly infringes on the free exercise right if it "unduly burdens the free exercise of religion." *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 62, 358 Mont. 193, 244 P.3d 321. To determine if there is a burden on free exercise, the Montana Supreme Court adopted the *Thomas* test established by the U.S. Supreme Court. *Id.* The *Thomas* test states "[w]here the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religious exists." *Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981).

Plaintiffs have not shown that Rule 1 unduly burdens their free exercise of religion. The first part of the *Thomas* test is to determine whether using Program scholarships at a religious school is an important benefit. Montana guarantees and provides a public, secular education to its citizens, which is an important benefit provided by the government. *See* Mont. Const. Art. X. However, government funding a parent's personal choice of education is not similar to the secular education granted by the Montana Constitution and is not an important benefit. Thus, Plaintiffs cannot meet the first prong of the test. The second part of the *Thomas* test focuses on whether attending a religious school is "proscribed by a religious faith" or "mandated by a religious belief." Nothing in the record indicates that Plaintiffs' religious faith mandates that they enroll their children in religious school or that their faith forbids Plaintiffs from enrolling their children in a secular school. The Plaintiffs' personal preference that their children attend a religious school is not equivalent to a mandate by their religious faith. Many children from religious families attend public schools. Furthermore, the Montana Supreme Court has rejected the idea that a party's religious motivation for undertaking an act can transform a regulation into a prohibition on religious conduct. *Big Sky Colony*, ¶ 27 (citing *Dept. of Human Resources of*

Oregon v. Smith, 494 U.S. 872, 878 (1990)). Thus, Plaintiffs cannot meet the second prong of the test. Based upon the foregoing, the Court should deny Plaintiffs' Motion for Summary Judgment and grant the Department's cross-motion for Summary Judgment.

3. Rule 1 does not deny the Equal Protection of the Laws

Plaintiffs rely on *Small v. McRae*, 200 Mont. 497, 51 P.2d 982 (1982), to add apparent weight to their argument. However, Plaintiffs' reliance on *Small* does not take into account the competing interests involved. Montana Constitution Article II, § 4 prohibits discrimination on the basis of religion, but it must be read in conjunction with the strong separationist provisions in Article II, § 6 and Article X, § 6, which provide a compelling state interest. *Cf. Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 386 (W.D. Mo. 1973) (summarily affirmed). In *Locke*, the U.S. Supreme Court held that Washington's interest in complying with its constitutional prohibition against funding scholarships for devotional degrees was "substantial." *Locke*, 540 U.S. at 725. Similarly, the State maintains a compelling interest in obeying its constitution's anti-establishment mandates. Consequently, the Department adopted Rule 1 to further the State's compelling interest in avoiding an establishment violation.

No more narrow tailoring is possible than to prohibit religious aid to the same extent prohibited by the Montana Constitution. Rule 1 uses the same entities to which aid is prohibited as set forth in the Montana Constitution. *Compare* ARM 42.4.802(1) and Mont. Const. Art. X, § 6. Rule 1 does not expand or contract the prohibition found in the Montana Constitution. Thus, the rule comports with the separationist provision in Article X, Section 6, and is narrowly tailored to effectuate its purpose of maintaining separation.

Furthermore, the U.S. Supreme Court has rejected the effort to create a separate and distinct framework for analyzing claims of religious discrimination under the Equal Protection Clause. *Locke*, 540 U.S. at 720 n. 3 (the Free Exercise Clause provides the primary framework

for assessing religious discrimination claims). If a challenged law comports with the Free Exercise Clause, the religious discrimination analysis is concluded, and rational basis scrutiny applies to any further equal protection analysis. *Id.*; *see also Johnson v. Robinson*, 415 U.S. 361, 375 n. 14 (1974). As Rule 1 comports with the Free Exercise Clause, this Court should apply rational basis scrutiny during its equal protection inquiry. The State's compelling interest in separation and the narrow tailoring of Rule 1 meet and exceed rational basis scrutiny. Based upon the foregoing, the Court should reject Plaintiffs' Motion for Summary Judgment and grant the cross-motion for Summary Judgment in favor of the Department.

CONCLUSION

Following passage and approval of SB 410 by the 2015 Legislature, the Department of Revenue followed the legislative instructions to adopt rules necessary for implementation of the bill. To protect the constitutional prohibition against aid to religious schools and to avoid the advancement of religion, the Department adopted ARM 42.4.802. Plaintiffs have alleged on motion for summary judgment that the Department must essentially ignore the constitutional proviso in § 15-30-3101, MCA, mandated by the Legislature and ignore Art. X, § 6 altogether and allow the indirect aid to religious schools that Plaintiffs seek. The record of material facts demonstrate that, without the rule, the program's primary purpose and effect would be to support religious education with public funds in contravention of both the state and federal constitutions. Plaintiffs have further failed to prove beyond a reasonable doubt that the Department's implementation of SB 410 is unconstitutional under federal or state law. For these reasons, and for the reasons stated above, the Court should deny Plaintiffs' motion for summary judgment.

The Department has faithfully applied SB 410 and the Montana Constitution to the implementation of the law. For the reasons shown above, the Department respectfully requests that the Court grant its motion for summary judgment as a matter of law that the statute requires

the program to be implemented in a manner that avoids directly or indirectly supporting religious education with public funds.

Respectfully submitted this 7th day of July, 2016.

MONTANA DEPARTMENT OF REVENUE

DANIEL WHYTE
BRENDAN BEATTY
NICHOLAS J. GOCHIS
Special Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of July, 2016, I served true and accurate copies of the foregoing *Montana Department of Revenue's Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Brief in Support of the Department's Cross Motion for Summary Judgment* by the method(s) indicated below, addressed as follows:

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com
Attorney for Plaintiffs

✓ U.S. Mail, Postage Prepaid
_____ Federal Express, Billed to Sender
_____ Hand Delivery
_____ E-Mail
_____ Fax to _____

Richard D. Komer
Erica Smith
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
rkomer@ij.org
esmith@ij.org
Attorney for Plaintiffs

✓ U.S. Mail, Postage Prepaid
_____ Federal Express, Billed to Sender
_____ Hand Delivery
_____ E-Mail
_____ Fax to _____